(2)

Supreme Court, U.S.
FILED
JUN 17 2003
OFFICE OF THE CLERK

No. 02-1694

In The

Supreme Court of the United States

BETTY WILLINGHAM,

Petitioner,

v.

JAMES LOUGHNAN AND BRIAN BUECLER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

GEORGE P. ROBERTS, JR., ESQ.
Counsel of Record
ROBERTS & REYNOLDS P.A.
470 Columbia Drive, Ste. 101C
West Palm Beach, FL 33409
561-688-6560

Counsel for Respondents James Loughnan & Brian Buecler

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

52 PK

QUESTIONS PRESENTED FOR REVIEW

1. Whether reliance by the Court of Appeals upon precedential authority of this Court, its own decisions and that of the state supreme court to determine clearly established constitutional rights or law conflicts with a persuasive, contrary consensus of the other Courts of Appeals to defeat the officers' entitlement to qualified immunity?

2. Whether an interlocutory appeal affirming a denial of a state official's claim to qualified immunity because of a dispute of material facts constitutes the "law-of-the-case" that precludes further consideration of their claim at trial or upon subsequent appeal post-trial?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Table of Authorities	iii
Statement of the Case	1
Reasons for Denying the Writ	4
Preface	4
I. The questions presented were not properly preserved for review	5
II. The decision of the Court of Appeals after remand does not conflict with this Court's decisions, its own precedent, nor a consensus of persuasive authority of the Courts of Appeals on the issue	6
III. The law-of-the-case doctrine has not been rejected by the Court of Appeals in qualified immunity cases, nor are the other circuits' views to the contrary; it simply was not applicable to the decision below	22
Conclusion	29

TABLE OF AUTHORITIES

Page

CASES

Amaechi v. West, 237 F.3d 356 (4th Cir. 2001) 19

Anderson v. Creighton, 483 U.S. 635 (1987).....10

Atkinson v. Taylor, 316 F.3d 257 (3d Cir. 2003).....16

Barts v. Joyner, 865 F.2d 1187 (11th Cir.), *cert. denied*, 493 U.S. 831, 110 S.Ct. 101, 107 L.Ed.2d 65 (1989).....17

Behrens v. Pelletier, 516 U.S. 299 (1996).....29

California v. Taylor, 353 U.S. 553, 77 S.Ct. 1037, 1 L.Ed.2d 1034 (1957) 6

Capoeman v. Reed, 754 F.2d 1512 (9th Cir. 1985).....18

City of Springfield, Mass. v. Kibbe, 480 U.S. 257, 107 S.Ct. 1114, 94 L.Ed.2d 293 (1987)..... 5

Clark v. Beville, 730 F.2d 739 (11th Cir. 1984).....11

Clem v. Corbeau, 284 F.3d 543 (4th Cir. 2002).....14

County of Sacramento v. Lewis, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) 18

Donovan v. City of Milwaukee, 17 F.3d 944 (7th Cir. 1994).....17

Elliot v. Leavitt, 99 F.3d 640 (4th Cir. 1996), *petition for reh'g en banc denied*, 105 F.3d 174 (1997) 21

Forrett v. Richardson, 112 F.3d 416 (9th Cir. 1997) 21

Franklin v. County of Riverside, 971 F.Supp. 1332 (C.D. Cal. 1997).....12

Fundiller v. City of Cooper City, 777 F.2d 1436 (11th Cir. 1985).....11

TABLE OF AUTHORITIES – Continued

Page

Garcia by Garcia v. Miera, 817 F.2d 650 (10th Cir. 1987) 18

Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974) 6

Gilmere v. City of Atlanta, 774 F.2d 1495 (11th Cir. 1985) 11

Graham v. Connor, 109 S.Ct. 1865 (1989) 23

Haddaway v. Ellerbusch, 996 F.2d 1211, 1993 WL 238997 (4th Cir. June 30, 1993) 14

Hamilton v. Lyons, 74 F.3d 99 (5th Cir. 1996) 12

Harrell v. Decatur County, Ga., 41 F.3d 1494 (11th Cir. 1995), *vacating and adopting dissent in* 22 F.3d 1570 (11th Cir. 1994) 21

Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994) 12

Hegarty v. Somerset County, 53 F.3d 1367 (1st. Cir. 1995), *cert. denied*, 516 U.S. 1029, 1165 S.Ct. 675, 133 L.Ed.2d 524 (1995) 21

Helling v. McKinney, 509 U.S. 25, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1994) 16

Hope v. Pelzer, 536 U.S. 730, 122 S.Ct. 2508 (2002) 3, 6, 7, 22, 29

Hudson v. Hughes, 98 F.3d 868 (5th Cir. 1996) 12

In re City of Philadelphia, 158 F.3d 711 (3d Cir. 1998) 26, 28, 29

Johnson v. Jones, 515 U.S. 304, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995) 24, 27

Kelly v. Curtis, 21 F.3d 1544 (11th Cir. 1994) 26

TABLE OF AUTHORITIES – Continued

Page

Killian v. City of Riverview, 98 F.3d 1342 (6th Cir. 1996) 12

Kimberlin v. Quinlan, 199 F.3d 496 (D.C. Cir. 2000) 28

Lassiter v. Alabama A&M University, 28 F.3d 1146 (11th Cir. 1994) 10

Marsh v. Butler County, Ala., 268 F.3d 1014 (11th Cir. 2001) (*en banc*) 8, 9

McClendon v. City of Columbia, 305 F.3d 314 (5th Cir. 2002), *cert. denied*, 123 S.Ct. 1355 (2003) 16, 17

McCloud v. Testa, 97 F.3d 1536 (6th Cir. 1996) 27, 28, 29

McKinney v. DeKalb County, 997 F.2d 1440 (11th Cir. 1993) 11

Menuel v. City of Atlanta, 25 F.3d 990 (11th Cir. 1994) 22

Montoute v. Carr, 114 F.3d 181 (11th Cir. 1997) 21

Nelson v. County of Wright, 162 F.3d 986 (8th Cir. 1998) 21

Ohio Civil Serv. Employees Ass'n v. Seiter, 858 F.2d 1171 (6th Cir. 1988) 17

Oladiende v. City of Birmingham, 230 F.3d 1275 (11th Cir. 2000) 25, 26

Ort v. White, 813 F.2d 318 (11th Cir. 1987) 7

Plakas v. Drinski, 19 F.3d 1143 (7th Cir. 1994) 22

Poe v. Leonard, 282 F.3d 123 (2nd Cir. 2002) 15

Priester v. City of Riviera Beach, 208 F.3d 919 (11th Cir. 2000) 10

Riley v. Camp, 130 F.3d 958 (11th Cir. 1997) 25

TABLE OF AUTHORITIES – Continued

Page

Roy v. Inhabitants of Lewiston, 42 F.3d 691 (1st Cir. 1994) 7, 8, 21

Samples v. City of Atlanta, 846 F.2d 1328 (11th Cir. 1988) 11

Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) 5, 7, 8, 10

Sims v. Metropolitan Dade County, 972 F.2d 1230 (11th Cir. 1992) 27

Skurstenis v. Jones, 236 F.3d 678 (11th Cir. 2000) 18

St. Hilaire v. City of Laconia, 71 F.3d 20 (1st Cir. 1995) 21

Tennesse v. Garner, 471 U.S. 1 (1985) 11, 15

Thomas v. Roberts, 323 F.3d 950 (11th Cir. 2003) 13, 14

Tinetti v. Wittke, 479 F.Supp. 486 (E.D. Wis. 1979) 18

Tribble v. Gardner, 860 F.2d 321 (9th Cir. 1988) 18

Trulock v. Freeh, 275 F.3d 391 (4th Cir. 2001), *cert. denied*, 123 S.Ct. 621 (2002) 19

U.S. v. Lanier, 520 U.S. 259, 117 S.Ct. 1219 (1997) 8, 10

Varrone v. Billoti, 123 F.3d 75 (2nd Cir. 1997) 15

Vaughan v. Cox, 264 F.3d 1027 (11th Cir. 2001) 14

Vaughan v. Cox, 316 F.3d 1210 (11th Cir. 2003) 14, 15

Vazquez v. Metropolitan Dade County, 968 F.2d 1101 (11th Cir. 1992) 11

Villano v. City of Boynton Beach, 254 F.3d 1302 (11th Cir. 2001) 24

Ward v. San Diego County, 791 F.2d 1329 (9th Cir. 1986) 18

TABLE OF AUTHORITIES – Continued

Page

Weber v. Dell, 804 F.2d 796 (2nd Cir. 1986).....15

Webster v. City of Houston, 689 F.2d 1220 (5th Cir. 1982).....12, 13

Wheeler v. City of Pleasant Grove, 746 F.2d 1437 (11th Cir. 1984).....26

Willingham v. Loughnan, 261 F.3d 1178 (11th Cir. 2001).....23

Willingham v. Loughnan, 321 F.3d 1299 (11th Cir. 2003).....11

Wilson v. Layne, 526 U.S. 603, 119 S.Ct. 1692 (1999).....*passim*

Wright v. Smith, 21 F.3d 496 (2nd Cir. 1994).....15

Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992 (1975).....14

CONSTITUTIONS

U.S. Const. amend. I.....28

U.S. Const. amend. IV.....21, 29

U.S. Const. amend. VIII.....6, 7, 16

U.S. Const. amend. XIV.....16

RESPONDENTS LOUGHNAN & BUECLER'S BRIEF IN OPPOSITION TO PETITIONER WILLINGHAM'S SECOND PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On October 7, 1987, just before midnight, Petitioner Betty Willingham, was simultaneously shot by Boynton Beach, Palm Beach County, Florida police Officers James Loughnan and Brian Buecler after having committed a battery on Officer Loughnan and within a split-second of having attempted to murder Officer Ron Panucci, who was attempting to arrest her brother, Arnold Sims.

According to the officers, who testified at her criminal and civil trial, she had a long blade kitchen knife in her hand and was attempting to stab Panucci in the back at the time she was shot. An independent witness testified at both trials that she was on the step outside her house with an object in her hand at the time she was shot. Willingham claimed that she was standing in the doorway, pulling her hair at the time she was shot. Her version of the events was rejected when she was convicted in June 1989 of both crimes by the Palm Beach County criminal court jury, a conviction that was neither appealed nor vacated.

In 1990, Willingham sued the City of Boynton Beach, its police chief Edward Hillery and Officers James Loughnan and Brian Buecler. After the officers moved for summary judgment on the sole state law claims against them in 1992, Plaintiff amended her complaint to bring federal

civil rights claims against them. The officer's summary judgment on the state law claims was denied in 1993.[1]

The officers moved for summary judgment on the federal claim of excessive force in 1995, asserting qualified immunity. In 1996, the District Court denied the motion finding that there was a factual dispute not specified in the order and upon the misapprehension that there had been a previous denial of the motion. The officers took an interlocutory appeal to the Eleventh Circuit. Petitioner's motion to dismiss the appeal as frivolous was denied and a stay order denied by the District Court was granted by the Court of Appeals.

In September 1997, the Court of Appeals, in an unpublished opinion, affirmed the denial of the motion for summary judgment due to the claimed factual dispute of whether Plaintiff was doing nothing at the time she was shot or was attempting to murder an officer. In the panel's view, the issue preclusion argument on Petitioner's criminal convictions was not properly presented for review.

After the District Court again denied the officers motions for judgment on qualified immunity at trial and post-trial, a timely appeal was lodged in the Court of Appeals of the 5.5 million dollar verdict rendered against the officers by a jury in Miami-Dade County.[2] Upon review of the entire record, including the criminal trial transcript and proceedings (as had the District Court when it decided

---

[1] These claims were eventually dropped by Plaintiff at the commencement of trial.

[2] The judgment against the City of Boynton Beach for five million dollars was set aside by the District Court and affirmed on appeal. Petitioner did not seek review of that decision in her first petition for writ of certiorari.

the officers' post-trial motion for judgment) the Court of Appeals properly found that the criminal conviction at a minimum established that Plaintiff was shot within a "split-second" of having attempted to murder one police officer and battering another and was not restrained and potentially in a position to continue her assaults on the police.

Finding that it was not clearly established in 1987 that the use of force by these officers under the circumstances presented to them was unlawful, and that there existed a number of decisions both before and subsequent to the incident, under materially similar circumstances, holding that such conduct was lawful, the court determined that qualified immunity was applicable to bar the Petitioner's Fourth Amendment claim against the officers.

Petitioner's suggestion for rehearing *en banc* was denied as a motion for rehearing by the panel. No request was made by a judge of the court to poll the judges on the suggestion of rehearing *en banc*.

A petition for writ of certiorari was timely filed with this court to hold the case pending this Court's decision in *Hope v. Pelzer*.[3] A brief in opposition was filed. Without further briefing, after a decision was rendered in *Hope*, this Court entered an order granting certiorari, vacating the decision of the Court of Appeals and remanding for reconsideration in light of *Hope*.

The Court of Appeals requested supplemental briefs from the parties on the issue of reconsideration of the decision in light of *Hope*. The parties timely filed briefs. The Court of Appeals rendered its reconsidered opinion

---

[3] 536 U.S. 730, 122 S.Ct. 2508 (2002).

finding that the officers were still entitled to qualified immunity. [Pet. App. A].

Without moving for a rehearing *en banc* in the Court of Appeals, Petitioner timely filed her second petition for writ of certiorari with this Court.

REASONS FOR DENYING THE WRIT

PREFACE

The first question presented, whether the Court of Appeal's reliance upon only the Constitution, prior decisional law of this Court, the Court of Appeals and the state supreme court, a position allegedly contrary to the other Courts of Appeals, is raised for the first time in this petition.[4]

The second question presented, whether the law-of-the-case doctrine in deciding succeeding appeals on qualified immunity, has been rejected by the Court of Appeals, contrary to the view of the other Courts of Appeals, is also first raised in this petition. The contention that the Court of Appeals failed to follow its own precedent on the issue was first previously raised in the first petition for writ of certiorari. This latter issue was not specified as an issue for reconsideration upon remand.

[4] The first "question presented for review" initially [Pet. at *i*] differs from the questions described in the table of contents [Pet. at *iii*] and the headings in "reasons for granting the writ." [Pet. at 7]. The latter description of the questions presented will be addressed herein.

I. The questions presented were not properly preserved for review.

Neither question or issue was timely pressed or considered by the courts below. In the Court of Appeals, Petitioner's response brief to the initial appeal, made no argument, nor cited any case in support of the proposition that there was precedent prior to 1987 that gave fair and clear warning to a reasonable officer that his conduct under these circumstances presented to him would violate constitutional law.

Petitioner's focus, in her initial response, was that there was no qualified immunity in an excessive force claim. However, that contention was rejected by this Court in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001).

Upon remand from this Court for reconsideration, in her supplemental brief, Petitioner did not cite to any consensus of persuasive authority from the other Courts of Appeals that should have been considered to have given fair warning to the officers that their conduct in October 1987 violated clearly established law. [Resp. App. A].

Contrary to the invitation for supplemental briefing, Petitioner did raise the law-of-the-case argument in her supplemental brief. However, no argument was made that the position of the Court of Appeals was different from the other Courts of Appeals or that there was a consensus of persuasive authority that should have been followed.

Thus, certiorari should not be granted because the issues presented for review were neither timely presented nor considered in the Court of Appeals or the District Court. *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259, 107 S.Ct. 1114, 1115, 94 L.Ed.2d 293 (1987) ("We

ordinarily will not decide questions not raised or litigated in the lower courts. *See California v. Taylor*, 353 U.S. 553, 556, n. 2, 77 S.Ct. 1037, 1039, n. 2, 1 L.Ed.2d 1034 (1957)").

II. The decision of the Court of Appeals after remand does not conflict with this Court's decisions, its own precedent, nor a consensus of persuasive authority of the Courts of Appeals on the issue.

A. No conflict with *Hope*.

Initially, it is instructive to note that in *Hope v. Pelzer*, 530 U.S. 730, 122 S.Ct. 2508 (2002), qualified immunity was denied because this Court found that there was preexisting precedent in the Court of Appeals that gave clear and fair warning that the officers' conduct, as shown by the facts alleged, violated the Eighth Amendment proscription against cruel and unusual punishment. This Court concluded that *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974) was controlling precedential authority since there was not a significant difference between handcuffing prisoners to a fence and handcuffing them to a post. As this Court noted:

> Cases decided by the Court of Appeals for the Fifth Circuit before 1981 are binding precedent in the Eleventh Circuit today. See *Bonner v. Prichard*, 661 F.2d 1206 (C.A.11 1981). In one of those cases, decided in 1974, the Court of Appeals reviewed a District Court decision finding a number of constitutional violations in the administration of Mississippi's prisons. *Gates v. Collier*, 501 F.2d 1291.

Hope, 530 U.S. at 742, 122 S.Ct at 2516. This Court specifically noted that "[i]n light of *Gates*, the unlawfulness of the alleged conduct should have been apparent to the respondents." *Id.* at 743.

This Court then added that "[t]he reasoning, though not the holding, in a case decided by the Eleventh Circuit in 1987 sent the same message to reasonable officers in that Circuit." *Id.* In *Ort v. White*, 813 F.2d 318 (11th Cir. 1987), this Court felt that the basic premise of depriving prisoners of necessities, such as drinking water, as punishment was established as violative of the Eighth Amendment.

This Court even held that a number of contrary "unreported" Alabama District Court decisions should have been disregarded, because they were "distinguishable on their own terms . . . [and] no match for the Circuit precedents." *Hope* at 747.

This Court did not look to "a consensus of persuasive authority" of the Courts of Appeals to determine whether fair warning was provided to the officers *in the circuit*. The focus was clearly limited to binding precedent in the Eleventh Circuit. Petitioner must have reached this same understanding because she did not argue to the contrary in her supplemental brief upon reconsideration. [Resp. App. A.].

The holding of the Court of Appeals below is not contrary to the decisions of this Court. In *Saucier v. Katz*, 533 U.S. 194, 202, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001), this Court observed that the general rule that officers may not use unreasonable force when making an arrest can only provide concrete guidance when it is made specific in particular cases. Additionally it was re-emphasized that "[e]xcessive force claims, like most other Fourth Amendment issues, are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred." *Id.*, 533 U.S. at 207.

In *Saucier*, citation was made to *Roy v. Inhabitants of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994). Therein, the District Court properly granted summary judgment for the

defendant police officer who shot an armed, intoxicated, belligerently behaving arrestee. *Roy* stated:

> The Supreme Court intends to surround the police who make these on-the-spot choices in dangerous situations with a fairly wide zone of protection in close cases. Decisions from this circuit and other circuits are consistent with that view. And in close cases, a jury does not automatically get to second-guess these life and death decisions, even though the plaintiff has an expert and a plausible claim that the situation could better have been handled differently. 42 F.3d, at 695 (footnote omitted).

Saucier, 533 U.S., at 216, fn. 6, Ginsburg, J. concurring.

Moreover, The Court of Appeals has not ignored *U.S. v. Lanier*, 520 U.S. 259, 117 S.Ct. 1219 (1997). In *Marsh v. Butler County, Ala.*, 268 F.3d 1014, 1032-1033, (11th Cir. 2001) (*en banc*), the court addressed issues raised by *Lanier*. In note 9, the court noted:

> We acknowledge that preexisting case law, tied to the precise facts, is not in every situation essential to establish clearly the law applying to the circumstances facing a public official so that a reasonable official would be put on fair and clear notice that specific conduct would be unlawful in the faced, specific circumstances. *See United States v. Lanier*, 520 U.S. 259, 117 S.Ct. 1219, 1227, 137 L.Ed.2d 432 (1997) ("[A] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question.") (discussing 18 U.S.C. § 242); *Lassiter*, 28 F.3d at 1150 n. 4 (leaving open possibility that "occasionally the words of a federal statute or federal constitutional provision will be specific enough to establish the law applicable to particular circumstances clearly

> and to overcome qualified immunity even in the absence of case law");
>
> . . . .
>
> Some general statements of law are capable of giving fair and clear warning in some circumstances: the occasional "obvious clarity" cases per *Lanier*. But in other cases, as *Lanier* says, "a very high degree of prior factual particularity may be necessary." 117 S.Ct. at 1227. Especially where the applicable legal standard is a highly general one, such as "to act reasonably" or "to act with probable cause," preexisting case law, that has applied the general law to specific circumstances, will almost always be necessary to draw the bright line that is capable of honestly giving fair and clear notice that an official's conduct will violate federal law. *See Anderson*, 107 S.Ct. at 3040 (noting that pertinent qualified immunity question in probable-cause case is "fact-specific" question of whether a reasonable official could have believed, in light of clearly established law, that official's behavior was lawful under circumstances).
>
> . . . .
>
> *See also Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001) ("This inquiry [whether a legal right was already clearly established], it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition"); *Wilson v. Layne*, 526 U.S. 603, 119 S.Ct. 1692, 1699-1700, 143 L.Ed.2d 818 (1999) (saying "the right allegedly violated must be defined at the appropriate level of specificity. . . . ").

Marsh, 268 F.3d at 1032-1033.

Clearly, the Court of Appeals has found that "[o]ccasionally the words of a federal statute or federal

constitutional provision will be specific enough to establish law applicable to particular circumstances clearly and to overcome qualified immunity even in the absence of case law." *Lassiter v. Alabama A&M University*, 28 F.3d 1146, 1150 n. 4 (11th Cir. 1994). As recognized in *Marsh*, the Court of Appeals has held that an official may stray Aso far beyond the hazy border between constitutional and unconstitutional conduct" that the official "had to know he was violating the Constitution even without case law on point." *Priester v. City of Riviera Beach*, 208 F.3d 919, 926 (11th Cir. 2000) (quoting *Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997)). *Id.*, 268 F.3d at 1032.

This view of the Court of Appeals was noted in *Saucier v. Katz*, *supra*, "Qualified immunity operates in this case, then, just as it does in others, to protect officers from the sometimes 'hazy border between excessive and acceptable force,' *Priester v. Riviera Beach*, 208 F.3d 919, 926-927 (C.A.11 2000), and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier*, 533 U.S. at 206.

Moreover, in *Wilson v. Layne*, 526 U.S. 603, 119 S.Ct. 1692 (1999), decided two years after *Lanier*, this Court found the principles of *Anderson v. Creighton*, 483 U.S. 635, 639-640 (1987), still controlling:

> In *Anderson*, we explained that what "clearly established" means in this context depends largely "upon the level of generality at which the relevant 'legal rule' is to be identified." 483 U.S. at 639, 107 S.Ct. 3034. "[C]learly established" for purposes of qualified immunity means that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to

> say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.*, at 640, 107 S.Ct. 3034 (citations omitted); see also *United States v. Lanier*, 520 U.S. 259, 270, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997).

Wilson, 526 U.S. at 614-615.

B. No conflict with circuit precedent.

In the Court of Appeals, on remand, Petitioner asserted that "fair warning" of violation of a clearly established constitutional right was provided by *Tennessee v. Garner*, 471 U.S. 1 (1985); *McKinney v. DeKalb County*, 997 F.2d 1440 (11th Cir. 1993); *Vazquez v. Metropolitan Dade County*, 968 F.2d 1101 (11th Cir. 1992); *Samples v. City of Atlanta*, 846 F.2d 1328 (11th Cir. 1988); *Fundiller v. City of Cooper City*, 777 F.2d 1436 (11th Cir. 1985); *Gilmere v. City of Atlanta*, 774 F.2d 1495 (11th Cir. 1985); and *Clark v. Beville*, 730 F.2d 739 (11th Cir. 1984). Clearly, *McKinney* decided in 1993, *Vazquez* decided in 1992 and *Samples* decided in 1988, could not have given fair warning of clearly established law in 1987.

However, no analysis was provided below, nor in the petition herein, as to how these decisions would have given fair warning of clearly established law as applicable to the circumstances presented in this case. Thus, Petitioner has not provided any argument or analysis from which one could conclude that the determination by the Court of Appeals that "[n]one of these cases were close to this one in time or fact" is incorrect. *Willingham v. Loughnan*, 321 F.3d 1299, 1304 (11th Cir. 2003).

Petitioner's underlying focus is that this Court should revisit the underlying facts and reach the opposite result. Essentially, Petitioner wants this Court to "correct the result" rather than decide a conflict of the Courts of Appeals. Petitioner argues that "the second panel of the Court of Appeals ignored much of the evidence considered by the civil jury which did not conflict with the findings of the criminal jury." [Pet. at 9]. Petitioner ignores any discussion of the undisputed and judicially noticed fact that she was convicted of battery on one police officer and attempted murder of another for her conduct occurring within a "split second" of the use of force against her.

Petitioner's argument that the Court of Appeals was ignorant of "Respondents' own conduct of lies, planted evidence and a cover-up." [Pet. at 11] is simply not relevant to the qualified immunity analysis, as these are arguments, allegedly supporting claims that were never alleged against the officers, and which could have only been alleged against the City and even then, would have been barred by the Petitioner's conviction under *Heck v. Humphrey*, 512 U.S. 477, 483-485, 114 S.Ct. 2364, 2372-2373, 129 L.Ed.2d 383 (1994). *See Hudson v. Hughes*, 98 F.3d 868, 872 (5th Cir. 1996) (falsified police report, state witnesses committing perjury, ineffective counsel); *Killian v. City of Riverview*, 98 F.3d 1342 (6th Cir. 1996); *Hamilton v. Lyons*, 74 F.3d 99, 103 (5th Cir. 1996) (altering, destroying and suppressing evidence); *Franklin v. County of Riverside*, 971 F.Supp. 1332 (C.D. Cal. 1997) (perjury of police officer and false police report)

This argument's lack of relevance is corroborated by citation to *Webster v. City of Houston*, 689 F.2d 1220 (5th Cir. 1982). Not only was this initial panel decision vacated *en banc*, the decision related solely to the trial court judgment

finding municipal liability against the City of Houston. See Webster v. City of Houston,735 F.2d 838 (5th Cir. 1984). The City of Boynton Beach is no longer a party to these proceedings since the trial court's judgment notwithstanding the verdict was affirmed by the Court of Appeals and the City was not made a party to the first petition for certiorari.

C. No conflict with any consensus of persuasive authority from other circuits.

Petitioner claims, in her second quest for certiorari jurisdiction of this Court, that there is a conflict of the Court of Appeals with the views of all of the other Courts of Appeals with respect to the source of decisional law utilized in determining whether a constitutional right is "clearly established." Although the lengthy survey of the other circuits' approach is instructional, it does not reveal that there is any consensus.

More importantly, the decisions reviewed do not establish that there was a consensus of persuasive authority, in 1987, that would have given fair warning to reasonable officers that their conduct, under the facts presented to them by this case, in seconds before they reacted, would violate clearly established law.

In *Thomas v. Roberts,* 323 F.3d 950 (11th Cir. 2003), the Court of Appeals noted:

> In *Marsh v. Butler County*, 268 F.3d 1014 (11th Cir. 2001) (en banc), we implicitly reaffirmed that position when we stated that we do not understand *Wilson* to have held that a consensus of cases of persuasive authority would be able to establish law clearly. "Each jurisdiction has its own body of law, and splits between jurisdictions on matters of law are not uncommon. We do not

> expect public officials to sort out the law of every jurisdiction in the country." *Id.* at 1032 n. 10.

Thomas, 323 F.3d at 955. Petitioner's contrary contention would require police officer's to predict the course of a future decision of constitutional law. *Wood v. Strickland*, 420 U.S. 308, 322, 95 S.Ct. 992, 1001 (1975) ("That is not to say that school board members are 'charged with predicting the future course of constitutional law.' *Pierson v. Ray*, 386 U.S. at 557, 87 S.Ct. at 1219").

Contrary to Petitioner's argument, in *Clem v. Corbeau*, 284 F.3d 543 (4th Cir. 2002) (a decision announced 15 years post incident) there is no discussion of decisional law of other circuits as clearly establishing the law in the Fourth Circuit.[5] The Fourth Circuit did note that, "[w]ell before 1998 it was clearly established that a police officer could not lawfully shoot a citizen perceived to be unarmed and non-dangerous, neither suspected of any crime nor fleeing a crime scene." 284 F.3d at 554. However, that principle of *Garner*, has never been disputed. This decision is simply not apposite to the facts in this case.

Another argument of Petitioner is based upon the dissents of Judge Noonan of the Ninth Circuit in *Vaughan v. Cox*, 316 F.3d 1210 (11th Cir. 2003) and *Vaughan v. Cox*, 264 F.3d 1027 (11th Cir. 2001). Although *Vaughan* did involve the use of deadly force, this argument has little application to the questions presented because the opinions are contained in dissents, from cases decided in 2001 and 2003, are factually distinguishable, and based upon

---

[5] Indeed, citation to *Haddaway v. Ellerbusch*, 996 F.2d 1211, 1993 WL 238997 (4th Cir. June 30, 1993) is only in passing, since it was an unpublished decision.

the view that an officer, who failed to fire a warning shot, should not be entitled to qualified immunity because " . . . as a reasonable police officer [he] is presumed to be familiar with *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)." 316 F.3d at 1216.

In *Tennessee v. Garner*, 105 S.Ct. 1694, 1701 (1985), decided only two years before this incident, it was held that the use of deadly force was lawful when limited to where the officer "has probable cause to believe the suspect poses a threat of serious physical harm, either to the officers or others." *Id.* Thus, even the dissents in *Vaughan* do not conflict with the Court of Appeals source of decisional law, nor establish a consensus of other persuasive authority.

Petitioner fails to show that there is a persuasive consensus of the other circuits' approach on the source of clearly established rights or law. Petitioner concedes that the Second Circuit view is unclear. *Varrone v. Billoti*, 123 F.3d 75 (2nd Cir 1997), relying upon *Weber v. Dell*, 804 F.2d 796 (2nd Cir. 1986) was appropriately challenged, in *Poe v. Leonard*, 282 F.3d 123, 141 (2nd Cir. 2002). In *Weber* the issue of the source of precedent for clearly established law for the circuit was not discussed. On the other hand, in *Wright v. Smith*, 21 F.3d 496 (2nd Cir. 1994) the view was reiterated that "[w]e have held that in determining whether a right was clearly established at the time the defendants acted, a court should consider: . . . (2) *whether the decisional law of the Supreme Court and the applicable circuit court supports the existence of the right in question*; . . . " (citations omitted) (emphasis supplied). 21 F.3d at 500.

In *Atkinson v. Taylor*, 316 F.3d 257 (3d Cir. 2003), the Third Circuit, does rely upon cases of other circuits that had construed this Court's decision in *Helling v. McKinney*, 509 U.S. 25, 36, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1994) to find a violation of the Eighth Amendment clearly established where prison officials failed to provide for the medical needs of prisoners exposed to ETS. However, as the dissent ably explains, "the majority calls this conclusion 'clearly established' federal law, meaning that a reasonable prison official should have known that we would decide the case this way, even though the circuit courts have reached numerous differing results on this issue and there is no controlling precedent." *Id.*, 316 F.3d at 271. This view appears more consistent with *Wilson v. Layne*, 526 U.S. 603, 618, 119 S.Ct. 1692 (if judges disagree on a constitutional question, it is unfair to subject officials to money damages for picking the losing side of the controversy).

In *McClendon v. City of Columbia*, 305 F.3d 314 (5th Cir. 2002), *cert. denied*, 123 S.Ct. 1355 (2003) the *en banc* decision of the Fifth Circuit did resolve a conflict of circuit panels on the source of decisional law in favor of reviewing other circuit decisions for determination of whether a right under the Fourteenth Amendment "state-created danger theory" had been clearly established. However, the difficulty of this approach, in qualified immunity, is emphasized by the number of concurring and dissenting opinions. After reviewing other circuit decisions the Fifth Circuit correctly observed:

> Thus, while a number of our sister circuits had accepted some version of the state-created danger theory as of July of 1993, given the inconsistencies and uncertainties within this alleged consensus of authorities, an officer acting within the jurisdiction of this court could not possibly

> have assessed whether his or her conduct violated this right in the absence of explicit guidance from this court or the Supreme Court.

Id., 305 F.3d at 321. This decision corroborates that decisional constitutional rights will only provide clear warning, if established by the applicable circuit or this Court.

In the Sixth Circuit, it has been established that to determine whether a constitutional right is clearly established reference can be made, as a last resort, to decisions of other circuits. However, such a search is only a possibility to be made in the extraordinary case and where "these decisions must both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting." *Ohio Civil Serv. Employees Ass'n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988).

The Seventh Circuit has looked to other circuits for analogous cases to determine whether the law is clearly established, in the absence of precedent. *See Donovan v. City of Milwaukee*, 17 F.3d 944, 953 (7th Cir. 1994). But even then, the court recognized that this is a "heavy burden" and that where there are differing circuit decisions, the relevant case law is still developing, and thus, is not clearly settled, *citing to Barts v. Joyner*, 865 F.2d 1187, 1194 (11th Cir.), *cert. denied*, 493 U.S. 831, 110 S.Ct. 101, 107 L.Ed.2d 65 (1989). *Id.*, 17 F.3d at 953.[6]

---

[6] The issue in *Donovan*, the extent of constitutional rights involving high speed police chases was ultimately decided by this Court in

(Continued on following page)

The Tenth Circuit approach is somewhat different in that, in the absence of binding precedent of this Court or the Tenth Circuit, it can look to the other circuits to determine whether a "clear weight of authority" has been established. *Garcia by Garcia v. Miera*, 817 F.2d 650 (10th Cir. 1987).

The Eighth Circuit does appear to have followed the lead of the Ninth Circuit in adopting a wide-ranging approach that allows it to search for clearly established law, in the absence of binding precedent, from any source, including District Court decisions. *See Ward v. San Diego County*, 791 F.2d 1329 (9th Cir. 1986).[7] Additionally, this doctrine considers that law may be clearly established if it is likely "that the Supreme Court or this circuit would have reached the same result as courts which had previously considered the issue." *Tribble v. Gardner*, 860 F.2d 321, 324 (9th Cir. 1988). *See Capoeman v. Reed*, 754 F.2d 1512, 1515 (9th Cir. 1985). These circuits hold that "[g]overnment officials are charged with knowledge of constitutional developments, including all available decisional law. *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1048 (9th Cir. 1988)." *Tribble*, 860 F.2d at 324. Although the circuits supposedly do not impose a requirement that officers be law professors or academicians, it certainly requires them to be able to comprehend and apply the legal analysis employed to factually different circumstances. *See Capoeman v. Reed*, 754 F.2d

---

County of Sacramento v. Lewis, 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998).

[7] In *Ward* the Ninth Circuit relied upon the prior decision of *Tinetti v. Wittke*, 479 F.Supp. 486 (E.D. Wis. 1979), adopted on appeal by the Seventh Circuit, 620 F.2d 160 (7th Cir. 1980). The decision's vitality was questioned by the Eleventh Circuit in *Skurstenis v. Jones*, 236 F.3d 678 (11th Cir. 2000).

1512, 1514 (9th Cir. 1985). State officials are then called upon to stake their financial resources on their prognostication of how the Court of Appeals would later decide, a wager that would unlikely be made by any law professor or academician.

Petitioner mistakenly relies upon the *dicta* of the dissent in *Trulock v. Freeh*, 275 F.3d 391, 407 (4th Cir. 2001), *cert. denied*, 123 S.Ct. 621 (2002) as establishing the view of the Fourth Circuit. In this *Bivins* action against FBI agents, the majority held, based on a review of its decisions, that although prior precedent held that a search of a locked footlocker was unlawful, it did not follow that a search of password protected computer files was so analogous to defeat the officers' qualified immunity. *Id.*, 275 F.3d at 404.

In *Amaechi v. West*, 237 F.3d 356 (4th Cir. 2001), although it is stated that the Court of Appeals viewed *Wilson* as permitting review of a "consensus of persuasive authority" for clearly established law on an issue, the decision was based upon a finding that "[f]irmly rooted Supreme Court and Fourth Circuit precedent involving strip searches and body cavity searches should have made it apparent to West, as a reasonable officer, that his search of Amaechi was unlawful under the Fourth Amendment." *Id.*, 237 F.3d at 364.[8]

As recent as 1998, the Fourth Circuit agreed with the Eleventh and Sixth Circuits as to the source of decisional law. In *Wilson v. Layne*, 141 F.3d 111 (4th Cir. 1998), *en banc*, it was noted,

---

[8] In this decision, and a number of others cited by Petitioner, the "clearly established right" involved either a strip or cavity search, not the use of deadly force.

> The law is clearly established such that an officer's conduct transgresses a bright line when the law has "been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state." *Wallace v. King*, 626 F.2d 1157, 1161 (4th Cir. 1980); *see Cullinan v. Abramson*, 128 F.3d 301, 311 (6th Cir. 1997) (explaining that "[o]rdinarily, at least, in determining whether a right is 'clearly established' this court will not look beyond Supreme Court and Sixth Circuit precedent"), *cert. denied*, 523 U.S. 1094, 118 S.Ct. 1560, 140 L.Ed.2d 792 (1998); *Jenkins ex rel. Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 826 n. 4 (11th Cir.1997) (en banc) (explaining that "the law can be 'clearly established' for qualified immunity purposes only by decisions of the U.S. Supreme Court, [the] Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose"), *cert. denied*, 522 U.S. 966, 118 S.Ct. 412, 139 L.Ed.2d 315 (1997).

141 F.3d at 114.

Upon certiorari review by this Court, it was observed, in *Wilson v. Layne*, 526 U.S. 603, 617, 119 S.Ct. 1692 (1999) that:

> Petitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely, nor have they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.

Id., 526 U.S. at 617. This Court also held that the officers in this case cannot have been "expected to predict the future course of constitutional law. *Procunier v. Navarette*, 434 U.S. 555, 562, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978). *See*

also Wood v. Strickland, 420 U.S. 308, 321, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Pierson v. Ray*, 386 U.S. 547, 557, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967)." *Id.* 526 U.S. at 618. Finally, this Court observed that where the Courts of Appeals have differed on a constitutional question, "it is unfair to subject police to money damages for picking the losing side of the controversy." *Id.*, at 617-618.

In fine, it is fair to say that without specific guidance on the subject from prior precedent from this Court, that differing views have developed on the source of "clearly established" law. However, it is not a fair conclusion that one approach is necessarily derived into a persuasive consensus, nor that the Court of Appeals is wrong in its view.

But most importantly to these officers, there simply is no substantive application of this argument to the issues in this case. Petitioner simply has not provided proof of a "consensus of persuasive authority" that clearly established that they were fairly warned that their conduct, in 1987, was unlawful.

To the contrary, as argued below, the persuasive weight of authority, as evidenced by analogous decisions of the Courts of Appeals, is that their conduct, under the circumstances facing them, was consistent with the Fourth Amendment and *Garner*. *See Nelson v. County of Wright*, 162 F.3d 986, 991 (8th Cir. 1998); *Montoute v. Carr*, 114 F.3d 181, 184 (11th Cir. 1997); *Forrett v. Richardson*, 112 F.3d 416, 420 (9th Cir. 1997); *Elliot v. Leavitt*, 99 F.3d 640, 643 (4th Cir. 1996), *petition for reh'g en banc denied*, 105 F.3d 174 (1997); *St. Hilaire v. City of Laconia*, 71 F.3d 20, 28 (1st Cir. 1995); *Hegarty v. Somerset County*, 53 F.3d 1367 (1st Cir. 1995), *cert. denied*, 516 U.S. 1029, 1165 S.Ct. 675, 133 L.Ed.2d 524 (1995); *Roy v. Inhabitants of City of Lewiston*, 42 F.3d 691, 697 (1st Cir. 1994); *Harrell v. Decatur County, Ga.*, 41 F.3d 1494 (11th Cir. 1995), *vacating and adopting dissent in* 22 F.3d 1570 (11th Cir.

1994); *Menuel v. City of Atlanta*, 25 F.3d 990, 996 (11th Cir. 1994); *Plakas v. Drinski*, 19 F.3d 1143, 1148-50 (7th Cir. 1994).

III. The law-of-the-case doctrine has not been rejected by the Court of Appeals in qualified immunity cases, nor are the other circuits' views to the contrary; it simply was not applicable to the decision below.

A. The Court of Appeals decision does not conflict with its own precedent.

Petitioner again raises the argument that the Court of Appeal's first unpublished decision on qualified immunity, that was addressed by both the District Court and the circuit court opinions is binding law of the case that precludes further review of the issue.

As it was not addressed previously, it is presumed that this Court found the issue, then premised upon a dissent to denial of a petition for rehearing *en banc*, to be without merit. Petitioner has now discarded the initial premise in favor of alternative arguments that the Court of Appeals either did not follow its own precedent or that the decision of the Court of Appeals is contrary to the other Courts of Appeals.

As the remand from this Court was to re-consider the decision in light of *Hope v. Pelzer*, the Court of Appeals did not solicit supplemental briefing, nor address this argument in rendering its decision. Thus, this claim is at best, moot, and for practical purposes barred from further reconsideration.

The initial panel decision, on appeal of the denial of the officers' motion for summary judgment, was based upon a finding that there were material issues in dispute. Such a basis has not been found to have preclusive effect on further reconsideration of the defense at trial. There

was no determination of clearly established law that would deny qualified immunity to the officers, in the unpublished decision. [*See* Pet. App. F].

In this case, the seminal issue was timing. Prior to trial it was not established as to whether Willingham was shot after everything was over or whether the use of force was an integral part of the event. Indeed, as noted several times in the opinion of the Court of Appeals post trial, Willingham testified at trial that she was shot within a "split second" of throwing a knife at Panucci and raising her hands into the air. Moreover, it was established at trial that the entire event occurred with 90 seconds, clearly calling for the sort of "split-second" judgments of the officers envisioned by *Graham v. Connor*, 109 S.Ct 1865, 1872 (1989). *See Willingham v. Loughnan*, 261 F.3d 1178 (11th Cir. 2001).

Moreover, the criminal court transcript had not been presented nor reviewed by either the District or Circuit Court to determine the parameters of the preclusive effect of the criminal convictions. After its presentation at trial, it was given some weight by the District Court. However, the full legal import was only correctly recognized by the Court of Appeals.

In the first unpublished decision, the Court of Appeals did not make a judicial finding of fact. The District Court, in denying summary judgment found that "there remain in dispute genuine issue of material fact regarding the circumstances involved in the incident in question – and thus the applicability of qualified immunity to the case." [Pet. App. G, p. 79a]. The Court of Appeals, in affirming this finding, stated that since it declined to address the preclusive effect of the criminal conviction without having the criminal court transcript to review, if Plaintiff's version of the facts were accepted and "*[i]f* the officer fired on plaintiff even though she was posing no threat to

anyone, *they would have* violated clearly established law." [Pet. App. F, p. 78a]. (emphasis supplied).

This does not establish that the officers were not entitled to qualified immunity under the facts of the case – it was nothing more than a supposition that ***IF*** those facts which Plaintiff claims are in dispute are the ultimate facts and that the criminal trial transcript and conviction are not considered, then there would be no entitlement to qualified immunity. However, as the Court of Appeals addressed in detail, the facts at trial and the review of the criminal trial transcript and judgment show that there was clear entitlement to qualified immunity. *Id. See Johnson v. Jones*, 515 U.S. 304, 311, 319-20, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995) (where genuine issues of material fact exist, the officer is entitled to appeal the District Court's denial of his qualified immunity defense at the conclusion of trial). Petitioner has not argued that the facts were the same at the motion for summary judgment stage as at trial.

In her supplemental brief on reconsideration, Petitioner did not suggest that the Court of Appeals position was contrary to the other circuits. Indeed, Petitioner relied upon previous Eleventh Circuit authority for the proposition that "[i]t is firmly established rule of this Circuit that each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until that holding is overruled *en banc*, or by the supreme court." *Villano v. City of Boynton Beach*, 254 F.3d 1302, 1313 (11th Cir. 2001). [Resp. App. A, p. 15a].

When considering the motion for summary judgement, the District Court did not address clearly established law in its denial of summary judgment, nor did the Court of Appeals. As the District Court found in its order on

post-trial motions for judgment, ". . . . the officers properly and timely request that the Court revisit this factual issue, the Court still finds that the qualified immunity defense turns on issues of fact that were properly resolved by the jury." [Pet. App. D, p. 41a, n. 4]. The Court of Appeals found this to be error.

Moreover, Plaintiff's claim that the Court of Appeals rejects the application of the law-of-the-case doctrine is meritless. Having now discarded the argument (although it is still cited as authority – [Pet. at 26]) that Judge Tjoflat's *dissent* to the *denial of a request for hearing en banc* in *Riley v. Camp*, 130 F.3d 958 (11th Cir. 1997) is authority for the proposition, Petitioner now claims that *Oladiende v. City of Birmingham*, 230 F.3d 1275 (11th Cir. 2000) supports that contention.

However, *Oladiende* did not reject the application of the law-of-the-case doctrine to qualified immunity cases. The Court of Appeals, simply, after thoughtful, cogent discussion, found it not applicable to the case. *Id.* 230 F.3d at 1290.

Similar to the proceedings below in this case, the prior unpublished decision did not delineate established facts and find that there was no entitlement to qualified immunity – it simply found that facts were in dispute. [Pet. App. F, p. 78]. As the analysis of the issue of *Oladiende* concluded:

> Where a previous panel has given no explanation for its decision, a subsequent appellate court panel is "not bound by any 'law of the case' unless a determination by us concerning the propriety of [the district court's order] is necessarily inconsistent with every possible correct basis for the earlier rulings of this court." *Key v. Wise*, 629 F.2d 1049, 1054-55 (5th Cir. 1980). One correct basis for this court's earlier ruling is that there

> remained genuine issues of material fact in dispute requiring a trial as to the police department's interests and the individual defendants' motives in transferring the plaintiffs. Such a ruling would present no binding conclusion of law as to the defendants' qualified immunity, but would simply allow the case to proceed to the jury. A conclusion now, after the facts have been developed at trial, that the defendants are entitled to qualified immunity would not be inconsistent with this possibly correct basis for the earlier ruling of this court.

Oladiende, 230 F.3d at 1289-1290.

As far back as 1984, the Court of Appeals, in *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437 (11th Cir. 1984), delineated the general contours of law-of-the-case doctrine as above, and noted that there were certain exceptions, including when (1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to the issue, or (3) the prior decision was clearly erroneous and would work manifest injustice. These principles are markedly similar to those of the Third Circuit in *In re City of Philadelphia*, *supra*.

Most central to the consideration of this doctrine in this case is that in those cases where a motion for summary judgment based on qualified immunity is denied, because the facts are not fully developed, the District Court should be free to revisit the qualified immunity question during and post trial to determine whether the facts, as developed at trial, differ from those taken in the light most favorable to the plaintiffs at the summary judgment stage. *See Kelly v. Curtis*, 21 F.3d 1544, 1546 (11th Cir. 1994) (defendants may raise qualified immunity

anew at trial in motions for judgment as a matter of law because, "'rulings on summary judgment motions' are 'the facts for present purposes,' but they 'may not be the actual facts.'"); *see also Sims v. Metropolitan Dade County*, 972 F.2d 1230, 1233 (11th Cir. 1992).

If the facts presented by plaintiff at the summary judgment stage become, without notable exception, the "actual facts" as developed at trial, then the qualified immunity determination, if made by a prior appellate panel, should not be revisited. If however, as here, there truly was no qualified immunity determination made and there was a notable difference as to the facts and development of evidence (e.g., criminal trial transcript introduced; plaintiff admitting she was shot within a split second of throwing a knife) then the defendant's right to raise qualified immunity should be, as it was, preserved. *See Johnson v. Jones*, 515 U.S. 304, 311, 319-20, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995) (where genuine issues of material fact exist, the officer is entitled to appeal the District Court's denial of his qualified immunity defense at the conclusion of trial, once the factual issues have been resolved).

B. The Court of Appeals' decision is not contrary to the other Courts of Appeals.

Petitioner now suggests that the Court of Appeals position was contrary to the other circuits. In *McCloud v. Testa*, 97 F.3d 1536 (6th Cir. 1996), the Sixth Circuit recognized and concurred with the Court of Appeals analysis of the first panel decision below. The Sixth Circuit specifically found that:

> Uncertainty about the actual duties of these positions, when their inherent nature is not apparent (no parties to this suit have cited any

> helpful state or county law defining the duties of the positions), precludes us from reversing the district court's determination. We emphasize that qualified immunity may become available to Testa with respect to any of these positions as the facts are crystallized or the relevant state/county law is developed before the district court at any time up to or including the conclusion of trial. Our current disposition of this case does not prevent the district court from granting qualified immunity to Testa with respect to any of these positions.

Id., 97 F.3d at 1561, 1562. This hardly supports Petitioner's contention of conflict.

In *Kimberlin v. Quinlan*, 199 F.3d 496 (D.C. Cir. 2000) the individual defendants moved for summary judgment on qualified immunity which was denied by the District Court, finding that the law was clearly established that prison officials could not interfere with prisoner's First Amendment right to access to the press. This issue was not appealed, but other issues were. When remanded back to the District Court, it refused to revisit the issue on a *renewed motion for summary judgment*, relying on its previous decision as being the law of the case, *since that issue had not been appealed.* The Court of Appeals affirmed, on the same grounds. *Id.*, 199 F.3d at 498, 499.

In *In re City of Philadelphia*, 158 F.3d 711 (3d Cir. 1998) a prior appeal on summary judgment, which found that city officials were entitled to qualified immunity, had determined that the conduct of city officials constituted a

seizure of plaintiff by the City within the meaning of the Fourth Amendment. Since, as the Third Circuit emphasized, " . . . that because the evidence was at least as strong at trial on the issue of seizure as it was at the summary judgment stage, our prior ruling that a seizure occurred controls our resolution of this appeal." *Id.* 158 F.3d at 722. No such finding was made below that the summary judgment evidence was the same as it was at trial. Indeed, the Court of Appeals pointed out the lack of certain evidence caused it not to consider the legal issues.

Thus, the Court of Appeals' analysis does not differ from that of the other circuits. *See McCloud*, 97 F.3d at 1561, 1562 (qualified immunity may become available as the facts are crystallized or the relevant law is developed before the District Court at any time up to or including the conclusion of trial); *In re City of Philadelphia*, 158 F.3d 711, 718 (doctrine does not preclude reconsideration where: (1) new evidence is available, (2) a supervening new law has been announced, or (3) the earlier decision was clearly erroneous and would create manifest injustice).

Nor is it contrary to this Court's decisions. In *Behrens v. Pelletier*, 516 U.S. 299 (1996), the Court found that qualified immunity could be the subject of two *pre-trial* appeals, because the first may be on allegations and the second on actual facts found in discovery.

CONCLUSION

In her second petition to this Court, Petitioner raises new issues not timely pressed in the District Court or the Court of Appeals.

The Court of Appeals was directed to reconsider its prior decision in light of *Hope v. Pelzer*. Petitioner did not

provide any relevant authority to the Court of Appeals showing that the officers had fair warning of clearly established law mandating that their conduct, under the circumstances presented in the case, was unlawful. Nor has Petitioner provided such analysis to this Court.

Petitioner has not provided any consensus of persuasive authority from the other Courts of Appeals on the issues in this case that conflicts with precedent of the Court of Appeals.

The law-of-the-case doctrine has not been rejected by the Court of Appeals generally nor specifically in this case. It is simply not applicable under the facts.

What Petitioner suggests is that despite the law of this Court and The Courts of Appeals consistently holding that their conduct was lawful, Officers Loughnan and Buecler should have been prescient enough, in the split second they had to decide, to predict a future course of constitutional law that remains undisclosed. The looming reward for this choice is financial ruin. The Court of Appeals correctly found they had immunity from this action.

The petition should be denied.

Respectfully submitted,

GEORGE P. ROBERTS, JR., ESQ.
Counsel of Record
ROBERTS, REYNOLDS & BEDARD P.A.
470 Columbia Drive, Ste. 101C
West Palm Beach, FL 33409
561-688-6560

Counsel for Respondents
James Loughnan & Brian Buecler

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 99-4005

D.C. DOCKET NO. 90-8156-CIV-UUB

BETTY WILLINGHAM,

Plaintiff/Appellee/Cross-Appellant,

v.

JAMES LOUGHNAN and BRIAN BEUCLER,

Defendants/Appellants/Cross-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

APPEAL ON REMAND FROM THE UNITED STATES SUPREME COURT

APPELLEE'S SUPPLEMENTAL BRIEF

BARBARA A. HEYER, ESQ.
FLORIDA BAR NO: 346691
HEYER & ASSOCIATES, P.A.
Attorneys for Appellee
1311 SE 4th Avenue
Fort Lauderdale, Florida 33316
(954) 522-4922/(561) 833-1068
FAX NO: (954) 522-4955

* * *

D. ARGUMENT

I. THE IMPACT OF HOPE V. PELZER

The United States Supreme Court in *Hope*, specifically disappproved this Court's method of requiring facts of previous cases be "materially similar" in order for a plaintiff to overcome the qualified immunity defense. *Id.* at 2516. Based upon *Hope*, this Court, in its August 15, 2001 opinion, incorrectly granted qualified immunity, stating that:

> "[a]lmost always, to establish the law clearly in the context of the Fourth Amendment, *a materially similar case must have already decided that what the police officer was doing was unlawful*. . . . ('[N]o bright line exists for identifying when force is excessive; we have therefore concluded that unless a controlling and materially similar case declares the official's conduct unconstitutional, a defendant is usually entitled to qualified immunity."). . . . Our own survey of the case law indicates that in 1987 it was not clearly established that it constituted excessive force to shoot a person under the circumstances presented in this case." (Emphasis added). *Willingham, supra* at 1187.

The Appellants have argued that "[o]nly where there is a pre-existing, 'factually defined' case which is precisely on point can a litigant survive the defense of qualified immunity before the court of Appeals for the Eleventh Circuit." (Respondents' Brief, p. 5). While this is a correct statement of this Court's previous position with respect to qualified immunity, the Supreme Court opinion in *Hope* has determined that it was an incorrect position.

> "This rigid gloss on the qualified immunity standard, though supported by Circuit precedent, is not consistent with our cases. . . . Our opinion in *Lanier* thus makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed, in *Lanier*, we expressly rejected a requirement that previous cases be fundamentally similar. Although earlier cases involving fundamentally similar facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with materially similar facts. Accordingly, pursuant to *Lanier*, the salient question that the Court of Appeals ought to have asked is whether the state of the law in [1987] gave respondents fair warning that their alleged treatment of [Willingham] was unconstitutional."

Id. at p. 2511. Clear "fair warning" had been provided to Appellants both through case law, their training and common sense. Would any court in this land justify and condone a shooting by one of its citizens, let alone a supposedly highly trained police officer, under like circumstances? As best stated by this Court in its September 2, 1997 ruling: "According to plaintiff, she was shot when she was merely standing in the doorway of her house, screaming and pulling her hair and posing no threat to anyone. *If the officers fired on plaintiff even though she was posing no threat to anyone, they would have violated clearly-established law.*" (emph. added). (Appendix 2, p. 38a). Such a determination by this Court came as a result of evaluating several cases from this Court and the Supreme Court which clearly dictate that excessive force used in similar circumstances has been determined to be not

entitled to qualified immunity. *Tennessee v. Garner*, 471 U.S. 1 (1985); *Clark v. Beville*, 730 F.2d 739 (11th Cir. 1984); *Fundiller v. City of Cooper City*, 777 F.2d 1436 (11th Cir. 1985); *Gilmere v. City of Atlanta*, 774 F.2d 1495 (11th Cir. 1985); *Samples v. City of Atlanta*, 846 F.2d 1328 (11th Cir. 1988); *Vasquez, supra; McKinney by McKinney v. DeKalb County, GA.*, 997 F.2d 1440 (11th Circuit 1993). *McKinney* is of particular interest, as this Court determined that the officer in question was not entitled to qualified immunity, despite evidence that at the time of the shooting plaintiff "allegedly had a butcher knife in one hand and a twelve-inch stick in the other." *Id.* at 1442. According to this Court:

> "The law was clearly established before Nelsen's actions in March 1990 that police use of excessive force is a constitutional violation. *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1500-02 (11th Cir. 1985), *cert. denied*, 476 U.S. 1115, 106 S.Ct. 1970, 90 L.Ed.2d 654 (1986). The district court correctly held that the facts are in dispute as to what happened that led Officer Nelsen to fire his gun. As alleged by the plaintiffs, however, Abdul had previously put down his knife and was merely shifting position, not threatening the safety of any persons, when Officer Nelsen shot him."

Id. at 1443.

Additionally, the Appellants own conduct supports a finding that they knew that their conduct of shooting an unarmed woman when she was a threat to no one was unconstitutional. The planting of a second knife by the Appellants and the fabricated cocaine evidence was solely for the purpose of covering up conduct which they knew to be unlawful.

"'[I]t is the firmly established rule of this Circuit that each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until that holding is overruled en banc, or by the Supreme Court.'" (emph. added) *Villano v. City of Boynton Beach*, 254 F.3d 1302, 1313 (11th Cir. 2001).

The laws-of-the-case doctrine generally protects judicial findings of fact and law from subsequent review by the same court. "Under this doctrine, a court should not reopen issues decided in earlier stages of the same litigation." *Aguilar v. Agostini*, 521 U.S. 203, 236 (1997) (citing *Messenger v. Anderson*, 225 U.S. 436 (1912). The doctrine does not apply if the court is "convinced that [its prior decision] is clearly erroneous and would work a manifest injustice," *Arizona v. California*, 460 U.S. 605, n.8 (1983), "although as a rule courts should be loathe to do so in the absence of extraordinary circumstances . . ." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988). *See generally* 18B, C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 4478 (2002) ("The standards announced for departing from the law of the case commonly demand strong justification.").

Given the accepted evidence in the instant case, taken in the light most favorable to Appellee, "no factually-particularized, preexisting case law was necessary for it to be very obvious to every objectively reasonable officer facing [Appellants'] situation that [Appellants'] conduct . . . violated [Willingham's] constitutional right to be free of the excessive use of force." *Vinyard v. Wilson*, 2002 WL 31521208 (11th Cir. 2002). "The peculiar facts of this case are 'so far beyond the hazy border between excessive and acceptable force that [every objectively reasonable officer]

had to know he was violating the Constitution even without caselaw on point." *Id.*

The criminal conviction of BETTY WILLINGHAM cannot justify gunning her down when she was a threat to no one. "The fact that the act to which the police responded was a criminal act does not foreclose the possibility that the officers' response was also illegal. . . . To conclude otherwise would give law enforcement authorities *carte blanche* to respond as they please to criminal activity." *Vasquez, supra* at 1108-9.

> "'[W]hen "the defendants" conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts' that the action as unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established.' To hold otherwise would allow an officer who understood the unlawfulness of his actions to escape liability simply because the instant case could be distinguished on some immaterial fact, or worse, because the illegality of the action was so clear that it had seldom befcre been litigated." *Clem v. Corbeau*, 284 F.3d 543, 553 (4th Cir. 2002).

II. THE LAW PROVIDED "FAIR WARNING," PRECLUDING ENTITLEMENT TO QUALIFIED IMMUNITY

The Supreme Court has held that where an excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as a claim invoking the protections of the Fourth Amendment. *Graham v. Connor*, 109 S.Ct. 1865, 1871 (1989). The Supreme Court stated:

> "Today, we make explicit what was implicit in *Garner's* analysis, and hold that all claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard rather than under a 'substantive due process' approach." *Id.*

The conduct of Appellants when they unreasonably seized the Appellee as she stood, threatening nobody, in the doorway of her home, by shooting her eight times while standing less than 6 feet away from her violated "clearly established law." This is particularly true, where, as in the instant case, the only thing in Ms. WILLINGHAM's hands was hair.

"An officer will be entitled to qualified immunity if his actions were objectively reasonable, that is if an objectively reasonable officer in the same situation could have believed that the force used was not excessive. . . . protecting from suit all but the plainly incompetent or *one who is knowingly violating federal law.*" (Citations omitted). (Emphasis added). *Vinyard, supra* at p. 4.

"The threshold inquiry a court must undertake in a qualified immunity analysis is whether the plaintiff's allegations, if true, establish a constitutional violation. . . . 'the next sequential step is to ask whether the right was clearly established.'" (citations omitted). *Id.* at p. 4. "'The Fourth Amendment's freedom from unreasonable searches and seizures encompasses the *plain right* to be free from the use of excessive force in the course of an arrest.'" (emph. added). (citations omitted). *Id.* at p. 4. The Supreme Court has stated that the qualified immunity

inquiry focuses on whether the plaintiff can identify "controlling authority in [its] jurisdiction at the time of the incident which clearly established the rule on which [it] seeks] to rely," or "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Wilson v. Layne*, 526 U.S. 603, 617 (1999); *Hope, supra*. "Fair warning" can be demonstrated in various ways, and ". . . in the absence of fact-specific case law, the plaintiff may overcome the qualified immunity defense when the preexisting general constitutional rule applies 'with obvious clarity to the specific conduct in question,' and it must have been 'obvious' to a reasonable police officer that the pertinent conduct given the circumstances must have been unconstitutional at the time." (Citations omitted). *Vinyard, supra.* at p. 8. "'[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and *in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question*, even though "the very action in question has [not] previously been held unlawful"'" *Id.* at p. 8, citing to *Hope, supra* at 2516; *United States v. Lanier*, 520 U.S. 259, 271 (1997); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

The law providing "fair warning" to Appellants at the time is as follows:

"Whenever an officer restrains the freedom of a person to walk away, he has seized that person." *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694 (1985). A seizure is not unconstitutional unless it is unreasonable. What is unreasonable or reasonable is determined by " . . . balance[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of

the governmental interests alleged to justify the intrusion." *Id.* at 1699 (Quoting *U.S. v. Place*, 462 U.S. 696, 703, 103 S.Ct. 2637, 2642 (1983)). "In conducting this balancing test, we are to consider 'the scope of the particular intrusion, and the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.'" *Gilmere, supra* at 1502 (11th Cir. 1985) (Quoting *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S.Ct. 1861, 1884 (1979). See also: *Clark, supra; Fundiller, supra; Samples, supra; Vazquez, supra; McKinney, supra.*

The Court in *Graham* held that "the 'reasonableness' of a particular force must be judged from the perspective of a reasonable officer on the scene, rather than [that of an officer] with the 20/20 vision of hindsight. The test of reasonableness is an objective one, without regard to the underlying intent or motivation of the officer. The proper question to be asked is whether the officer's actions were objectively reasonable under the facts and circumstances confronting him." *Graham, supra* at 1872. Whether the force used was excessive must be objectively determined and is a jury question. *Barlow v. Ground*, 943 F.2d 1132 (9th Cir. 1991); *Posr v. Doherty*, 944 F.2d 91 (2d Cir. 1991); *Dixon v. Richer*, 922 F.2d 1456 (10th Cir. 1991); *Ortega v. Schramm*, 922 F.2d 684 (11th Cir. 1991).

In *Graham*, the Court held that it was reversible error for the trial court to apply the four-part test of *Johnson v. Glick*, 481 F.2d 1028 (2nd Cir. 1973) *cert. denied* 414 U.S. 1033 (1973) in a Fourth Amendment excessive force case. The Court noted that the *Johnson v. Glick* test which had previously been used to analyze excessive force claims was incompatible with a proper Fourth Amendment analysis. The *Johnson v. Glick* test required consideration of whether the individual officer acted in "good faith" or

"maliciously and sadistically for the very purpose of causing harm". The Supreme Court held that the consideration of these factors put in issue the subjective motivations of the individual officers, which has no bearing on whether a particular seizure is unreasonable under the Fourth Amendment. *Id.*

Addressing the use of deadly force, the United States Supreme Court stated:

> "The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. *Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.* . . . Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." (Emphasis added). *Garner, supra* at 1701.

Garner is not restricted to force intended to cause death. *Pruitt v. City of Montgomery*, 771 F.2d 1475 (11th Cir. 1985). It extends to "force capable of causing serious personal injury." *Id.* at 1479-1480, n.10. Under section 776.01 of Florida Statutes, deadly force "means force which is likely to cause death or great bodily harm. . . . "

In *Kidd v. O'Neil*, 774 F.2d 1252 (4th Cir. 1985), the Court noted that while *Garner* deals "specifically only with the extreme example of deadly force, nevertheless [it] makes clear that the use of any significant degree of excessive force in effecting otherwise constitutionally valid arrests may constitute an unreasonable seizure of the person in violation of fourth amendment rights." *Id.* at 1254. No bones need to be broken for a use of force to be "grossly disproportionate to the need . . . " *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981). (Police officer striking the plaintiff's camera with his nightstick, thereby causing the camera to strike and lacerate the plaintiff's forehead established a deprivation of his constitutional rights).

Even if the Appellants BEUCLER and LOUGHNAN had been attempting to effectuate a valid search, the force utilized was grossly disproportionate to what was required and would satisfy any balancing test. *Redley v. Leavitt*, 631 F.2d 358 (4th Cir. 1980); *Smith v. Hearod*, 498 F.2d 663 (5th Cir. 1974); *Green v. Cauthen*, 379 F.Supp. 361 (D.S.C. 1974); *Austin v. Hamilton*, 945 F.2d 1155 (10th Cir. 1991); *Turner v. County of Washoe*, 759 F.Supp. (630 (D.Nev. 1991); *Vasquez, supra.*

Given the claimed extensive training that officers received in the use of force, it may be questioned whether the assumption that police are frequently required to make "split-second" decisions is always an appropriate criterion for determining the reasonableness of the force. See: *Helseth v. Burch*, 258 F.3d 867, 876 (8th Cir. 2001). In the instant case, Appellants provided evidence to the district Court and the jury of their training with respect to "split-second" decision making abilities regarding the use of deadly force. What the evidence showed is that this training was ignored by the Appellant Officers. What the

evidence also demonstrated was that, at the time of the shooting, BETTY WILLINGHAM was obviously unarmed and a threat to no one, thereby precluding the defense of qualified immunity. *Clem, supra* at 552.

For this Court to award the Appellants with qualified immunity is only possible if this Court accepts the lies of the Appellants. Lies which were not accepted by the jury in this matter or the District Court. Appellants can only be entitled to qualified immunity only if this court determines, in contradiction to the jury, the District Court, and the original panel of this Court, that at the time of the shooting, Appellee "raised the second knife to her head and lunged, with the knife, towards Panucci" (Appellants' Initial Brief, p. 5; Appellants' Reply Brief, p. 1; Respondents' Brief, p. 1). In its August 15, 2001 opinion overturning the verdict and the District Court's ruling, this Court stated: ". . . she was not subdued; and 3) she was standing in the door to the kitchen where she had, just moments before, obtained weapons with which she had tried to kill one officer and assaulted another." *Willingham, supra* at p. 1187. At no time prior to this court's factual conclusion had the Appellants or anyone else alleged in any court the possibility of the Appellee rearming herself or, as previously stated, had there been a determination in the criminal proceedings that she "intended" to kill Panucci. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson v. Liberty Lobby,* 477 U.S. 242, 255 (1986). See also: *Eastman Kodak v. Image Technical Services,* 504 U.S. 451, 456 (1992).

In its August 15, 2001 opinion, this Court stated "Both Loughnan and Beucler fired two 'double-taps' at Plaintiff. . . . No argument was made at trial or on appeal that

the practice of shooting a 'double-tap' itself constitutes excessive force." *Willingham, supra* at p. 1182. Such a statement demonstrates that, unlike the jury and the District Court, this Court did not fully evaluate the accepted evidence in the light most favorable to the Appellee. If the Appellee was doing what the Appellants have alleged to the jury, the district court, this Court and the United States Supreme Court, it would be irrelevant how many bullets were fired at Ms. WILLINGHAM. What she proved to the District Court and the jury was what any reasonable officer under the same circumstances would know: You cannot shoot an unarmed woman once, let alone eight times, when she poses a threat to no one. BETTY WILLINGHAM proved this through her testimony, the testimony of Stanley Williams, the proven inconsistencies and lies by Appellants and members of the City of Boynton Beach Police Department, the testimony of both Appellee's and Appellants' police experts, both former police chiefs, and most importantly, the physical evidence.

CONCLUSION

For the foregoing reasons, the Appellee respectfully submits that this Court's August 15, 2001 decision should be reversed and that the District Court's judgment entered in her favor should be affirmed as to Appellants BEUCLER and LOUGHNAN in every respect.

Respectfully submitted,

/s/ Barbara A. Heyer
BARBARA A. HEYER
FLORIDA BAR NO: 346691
HEYER & ASSOCIATES, P.A.
1311 S.E. 4th Avenue
Fort Lauderdale, Florida 33316
(954) 522-4922/(561) 833-1068
FAX NO: (954) 522-4955

Counsel for Appellee